

Minutes for Meeting #12 Government Industry Advisory Panel (18-19 Jan 17)

Section 813, FY16 NDAA, Rights in Technical Data

ATTENDEES:

- **Panel Members:** Richard Ginman (Chair), Richard Gray, Charles Harris, Kelly Kyes, James McEwen, Roger Hamerlinck, Sean O'Brien, Dora Hancock, Joseph Gordon, Bill Elkington, Alison Brown, Carl Rapp
- **Support Staff:** LTC Andrew Lunoff (DFO), Mike Canales
- **Public:** Mark Borowski, Nancy Kremers, Josh Krotec, Jon Etherton, Karen Wilson
- **Public (On Telecon):** George Winborne, James Haag, Yoed Cameron Santos, Col Muha, Joel Van Over, Nicholas Florio, Jane Barrow, Barry Edelberg, Kevin O'Brien, Laurie Landgraf, Carolyn Nash, Robert Williams, Bill Decker, C. Joan Gilsdorf

ADMIN Meeting (Prior to Public Session)

- The panel held a short administrative meeting for thirty minutes prior to the public session in order to identify some logistical concerns of new FY17 NDAA language and the effects on the panel's schedule
- Designated Federal Officer discussed the ground rules for all members attending the question and answer session with the Section 809 Panel
 - Members planned to attend include: Harris, Elkington, Hamerlinck, McEwen, Kyes, Hancock, Ginman
 - Question and Answer session would be with the Subcommittee on Commercial Buying
- Briefly discussed the schedule moving forward with an attempt to complete the report by April/May timeframe
 - Felt that many of the comments would have effects on sustainment strategies
 - Next meeting would not occur until March
 - Co-Authors assigned for each tension point summary with intent that lead from each side receive input from respective members
 - Continued extension of schedule greatly affected by addition of Modular Open Systems Architecture (MOSA) language in FY17 NDAA

INTRODUCTIONS

- Introduced everyone – including those on the telephone
- Panel received written public comments from the Modification and Replacement Parts Association and the Aerospace Industries Association which are posted under the FACA Database site listed below

ADMIN NOTES

- No presentations occurred during this session. The panel focused on finalizing tension points between government and industry that were identified in received public comments and briefings.
- Panel received written public comments from the Modification and Replacement Parts Association and the Aerospace Industries Association which are posted under the FACA Database site listed below
- The resulting documents can be found at the following FACA database location under the titles of “Tension Point Assignment Summary” and “2320 Revision and Tension Point Summary” (pages 8-10):

<https://database.faca.gov/committee/meetingdocuments.aspx?flr=147543&cid=2561>

- Finalized which members would brief the Section 809 Panel

PANEL DISCUSSION ON TENSION POINT TOPICS:

Topics came up during discussion on identifying tension points at statutory or regulatory in nature:

- Overall discussion on 10 USC 2320
 - Need to clarify if we are talking about patents, data rights and trade secrets
 - Receive unlimited rights for Operations, Maintenance, Installation, and Training (OMIT) and possibly includes depot level data
 - OMIT and unlimited rights subject inventions and patent rights not covered by 2320 statutes
 - Hybrid of copyright and trade secret rights
 - Data rights don't give patents
 - OMIT can't restrict rights in statute and then move DFARS to unlimited
- Depot discussion and below includes OMIT, maintenance and in some cases DMPD
- Will this type of capability be needed for a satellite?
 - Depends on the type of satellite (one example provided)
 - However, if consistently asking for everything, then in violation of current policy
 - DFARS Subpart 227.7103-1 details to request minimum data necessary to fulfill mission
- Modular Open Systems Architecture (MOSA)
 - Received multiple briefings on the topic over the course of panel meetings
 - Have topic covered by tension points and will be addressed in final report
 - Major struggle defining the difference between major systems interface and interfaces

Topics came up during discussion of the following papers: 1.a.b.c. Business plans (combination of three papers); 5.e. OMIT vs Detailed Manufacturing and Process Data (DMPD); 6.c. Lack of trained personnel with drafts located on the FACA database

- 1.a.b.c. Business Plans (other notes included in document)

- Get the most for the least amount of money
- Encourage companies to invest in things that matter
- How do we define “full value on these rights”
 - Best practices in IP literature
 - LES established standard arm to do standards in field of IP management
- Need to make changes to papers to show clear strategy and policy recommendations
- Experts should include government and industry (IP valuation model)
- Look at an expanded solution of Specially Negotiated License Rights
 - Might help balance bargaining power issue
 - GPR/unlimited creates sense of not solid IP Strategy
 - Often SNLRs are not properly priced
- Any list of recommendations should include the need of OMIT data
- Need to note funding challenges up front (i.e. whether IP was privately funded)
- Currently, fewer commercial technologies bidding on DoD contracts
- For Recommendation 1: DoD acquisition of rights to privately funded and commercial IP—outside of the implied license rights purchased in the products and services offered for sale, themselves—shall be done in such a way that DoD pays fair value for those rights
 - Need to explain in RFP what we are asking for and how needs to be used
 - Need to understand differences in competitive and sole source
 - For certain strategies, may need clear preference for SNLR
 - Need to establish a baseline of what the program data rights strategy is and why
 - Should convey programs approach to Life Cycle Sustainment Plan (LCSP) and the IP Strategy to support such plan
 - Too often government does not own the technical baseline
- For Recommendation 2: The valuation of such unusual rights shall be assessed in accordance with best practices and industry standards and norms by experts in the field of IP valuation.
 - Things not stated are implicit
 - R&D is reimbursed by the government and the government pays for failed EMD projects
 - Need to continue to consider the uniqueness of Warfighter requirements
 - In dealing with IP valuation, should be using industry standards
 - Not going to use Cost Plus Reasonable Profit Model because commercial market does not do it
- 5.e. OMIT vs DMPD
 - Possibly develop another white paper on how to get data necessary
 - Tying manufacturing to limited quantities
 - Level, criticality and percentage
 - Request Section 809 panel establish the definition of Depot Level Maintenance on Software
 - Look at combining 2.b., 2.c., 2.f., and 2.i.

Public Comment, Mr. James Haag, Space and Missile Command

- 1.a.b.c. Business Plans
 - Unclear why members cannot be trained within source selection responsibilities
 - Should be another member of this team
 - Would need to explain how DoD would identify these experts
 - If experts come from industry, would need to make sure there were no conflicts of interest
- 6.c. Lack of trained personnel
 - For Recommendation 2: Cadre of Experts
 - This may require the use of highly paid experts
 - The government would not turn over its responsibility of decision to someone outside the source selection team
 - May have difficulty getting billets to support this cadre

Public Comment, Mr. Bill Decker, Defense Acquisition University (Briefing provided on FACA site)

- Very few in acquisition workforce have adequate knowledge in IP Strategy
- There is no requirement for currency and not necessarily required for certification
- IP strategy is often done prior to Milestone A
 - PSMs, SE, SW leads not often involved in development of this effort
 - SMEs are not up to date on current policy
- All members of Integrated Product Team (IPT) need additional training in this area
- Possibly might need to be part of the curriculum to become Level III in certification area
- DAU can develop and teach webinars as necessary to bring current personnel up to speed
- Panel Response to Comments:
 - Area of concern around IP valuation and life cycle costs
 - What is the optimal path forward to get best value for government?
 - Articulate all requirements up front
 - May decide effort is core, but may not be as efficient as industry
 - Include IP valuation in training requirements
 - One of the guidelines is for the panel to encourage commercial companies and innovation to work with the government
 - If provided a commercially available transmission, do we need data for depot purposes?
 - Commercial item definition in depot statute is much more narrow than Acquisition Statute (Title 41, Section 103)
 - Recommend 809 address multiple definitions of Commercial Items
 - 10 USC 2376 lists definitions and Title 41, section 103 does also

Public Comment, Ms. Jane Barrow, Naval Sea Systems Command, IP Counsel

- Need to continue additional training for Intellectual property attorneys

- Might be possible to incorporate it into current JAG school training and update trainers there

Section 809 Panel Topic Recommendations

- Varying definitions of Commercial items throughout statute and regulation
- Varying definitions of maintenance throughout statute and regulation
- Definition of Depot Software Maintenance responsibilities
- Who is engaged in IP Strategy development? Who are the key players?
- What is the necessary requirement for recurring training certifications in this area?

Administrative closeout:

- End of next week (27 Jan 17) all drafts complete
- By the second week of February, all tension point summaries should be read by panel members
 - Updated tracking sheet provided by DFO
- Consensus Huddles can begin by co-leads once all comments received, but should be done NLT 17 February
- Papers republished by co-leads NLT 24 February
- Next meeting will be held 8-9 March 17

APPROVED: PANEL CHAIR, MR. RICHARD T. GINMAN _____